No. 00-1122

Supreme Court, U.S.
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In The

Supreme Court of the United States

B.C. ROGERS PROCESSORS, INC., B.C. ROGERS POULTRY, INC., CHOCTAW MAID FARMS, INC., FOREST PACKING COMPANY, INC., MARSHALL DURBIN, INC., MARSHALL DURBIN FOOD CORPORATION, MARSHALL DURBIN POULTRY, INC., MARSHALL DURBIN OF TUPELO, INC. AND MOHAWK PACKING COMPANY,

Petitioners,

v.

THE BOC GROUP, INC., LIQUID AIR CORPORATION AND LIQUID CARBONIC INDUSTRIES CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL J. ABERNATHY
**Counsel of Record*
MARGARET A. MCGREAL
BELL, BOYD & LLOYD LLC
Three First National Plaza
Chicago, Illinois 60602
(312) 372-1121

WILLIAM G. SCHOPF, JR.
PATRICK J. HENEGHAN
ARTHUR J. HOWE
SCHOPF & WEISS
312 W. Randolph, Suite 300
Chicago, Illinois 60606
(312) 701-9300

JOHN E. BURKE
CLAUDIA J. LOVELETTE
CHRISTOPHER J. MURDOCH
MARTIN G. DURKIN
HOLLAND & KNIGHT
55 West Monroe Street, Suite 800
Chicago, Illinois 60603
(312) 263-3600

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Mississippi and California Opt-Out Plaintiffs ("Petitioners") waived their objections to a trial in the United States District Court for the Middle District of Florida by (i) agreeing during pretrial proceedings and in the Final Pretrial Order that this action would be tried in the Middle District of Florida, and (ii) failing to object to venue until the day the trial was scheduled to begin?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are correctly described in the Petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT	8
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

B.C. Rogers Processors, Inc. v. BOC Group, Inc., 524 U.S. 947 (1998) 1, 6

Charter Co. v. United States, 971 F.2d 1576 (11th Cir. 1992) 10

General Inv. Co. v. Lake Shore & Michigan Southern Ry., 260 U.S. 261 (1922) 8

Hoffman v. Balski, 363 U.S. 335 (1960) 10, 11, 12

In re Carbon Dioxide Indus. Antitrust Litig., 229 F.3d 1321 (11th Cir. 2000) ..... *passim*

Lee v. Chesapeake & Ohio Ry. Co., 260 U.S. 653 (1923) 8

Leroy v. Great Western United Corp., 443 U.S. 173 (1979) 8

Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998) ..... *passim*

Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939) 9, 11

Olberding v. Illinois Cent. R.R. Co., 346 U.S. 338 (1953) 8, 9

State of Florida v. Liquid Air, 136 F.3d 139 (11th Cir. 1998) 1, 6

STATUTES

15 U.S.C. § 16 4

15 U.S.C. § 26 4

28 U.S C. § 1391 4

28 U.S.C. § 1331 3

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1337 4

28 U.S.C. § 1367 4

28 U.S.C. § 1404(a) 10

28 U.S.C. § 1404(b) 10

28 U.S.C. § 1406(b) ..... *passim*

28 U.S.C. § 1407 8

RULES

Sup. Ct. R. 10(c) 1

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed *per curiam* the judgment of the Middle District of Florida without opinion. This affirmance is reported *sub nom. State of Florida v. Liquid Air*, 136 F.3d 139 (11th Cir. 1998). The unpublished orders of the Middle District of Florida are included in the Appendix to the Petition.

This Court granted *certiorari*, vacated the Eleventh Circuit decision and remanded the case to the Eleventh Circuit for further consideration in light of *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). *B.C. Rogers Processors, Inc. v. BOC Group, Inc.*, 524 U.S. 947 (1998). After reconsideration, the Eleventh Circuit affirmed the judgment of the Middle District of Florida. *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321 (11th Cir. 2000).

STATEMENT OF JURISDICTION

Certiorari is not appropriate because the Eleventh Circuit's decisions do not conflict with an applicable decision of this Court. Sup. Ct. R. 10(c).

STATUTE INVOLVED

The statutory provision involved in this response is 28 U.S.C. § 1406(b), which provides: "Nothing in this chapter shall impair the jurisdiction of a district court of

any matter involving a party who does not interpose timely and sufficient objection to venue."

STATEMENT OF THE CASE

The history ~~of this case~~ shows Petitioners failed to "interpose [a] timely and sufficient objection to venue" as required by 28 U.S.C. § 1406(b). On the contrary, they repeatedly consented to venue.

On April 22, 1992, the State of Florida filed a civil antitrust suit against Liquid Carbonic Industries Corporation, The BOC Group, Inc., and Liquid Air Corporation ("Respondents") in the United States District Court for the Middle District of Florida ("District Court" or "Middle District of Florida"). Thereafter, over a dozen "tag-along" actions were filed in the District Court and elsewhere. The California Plaintiff filed suit in the United States District Court for the Northern District of California and the Mississippi Plaintiffs filed suit in the United States District Court for the Southern District of Mississippi.[1] In 1992, the Judicial Panel on Multidistrict Litigation transferred all tag-along actions to the Middle District of Florida for coordinated pretrial proceedings. (Pet. at 4).

Petitioners filed amended complaints in the Middle District of Florida. On October 20, 1993, the California

[1] Counsel for the California Plaintiff had previously filed suit on behalf of Foster Poultry Farms Co. ("Foster Poultry") in the Middle District. For this reason, Foster Poultry is not a party to the Petition. (Pet. at ii).

Plaintiff filed its First Amended Complaint in that district, asserting jurisdiction and venue were proper under 28 U.S.C. § 1331. (R. 737-16). Likewise, on April 1, 1994, the Mississippi Plaintiffs filed their First Amended Complaint in the Middle District of Florida. (R. 965-13).

At a pretrial hearing on January 12, 1994, the District Court set a trial date for September 1995 in Orlando, Florida. (R. 2-312). In May 1995, the District Court rescheduled the trial to February 5, 1996 in Orlando. (R. 3-603-1). The District Court also set a final pretrial schedule including the dates for designating trial witnesses and serving final expert reports. Petitioners' counsel did not object to venue or suggest the cases should be transferred. (*Id.*).

Throughout the final pretrial stage, Petitioners continued to prepare for a trial in Orlando. (R. 10-918-1; R. 10-919-1; R. 10-920-1; R. 10-921-1). The parties submitted final expert reports in May 1995. In June, the parties exchanged trial witness summaries, including 18 witnesses affiliated with Petitioners. The final round of pretrial discovery, including depositions of Petitioners' employees, ended in November 1995.

During this time, Plaintiffs never objected to venue in Orlando. In fact, the Mississippi Plaintiffs opposed The BOC Group, Inc.'s motion for separate trials. (R. 3-640-8). They argued that the trial should be "consolidated," that no prejudice would result from a consolidated trial, and that separate trials would not serve the "goals of expeditiousness [and] economy." (*Id.*)

On August 9, 1995, the District Court ordered the parties to prepare a pretrial order by December 7, 1995.

(R. 3-641). In the Final Pretrial Order, which all parties signed, Petitioners consented to the District Court's exercise of personal jurisdiction and agreed venue was proper in the Middle District of Florida:

> *This Court has jurisdiction of the matters complained of* under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 16 and 26). It also has jurisdiction under 28 U.S.C. § 1337. The Court has supplemental jurisdiction over Florida's state law claims pursuant to 28 U.S.C. § 1367. *Venue is proper under 28 U.S.C. § 1391.*

(R. 3-740-25) (emphasis added).

On December 11, 1995, the District Court approved the Final Pretrial Order, confirmed the trial date of February 5, 1996 in Orlando and set hearings on pending motions. (R. 4-771). The District Court also set a date for the submission of motions *in limine* and ordered that it would hear those motions in Orlando on February 2, 1996, the Friday before trial. *Id.* Petitioners' counsel participated in this hearing and did not object to jurisdiction or venue.

On February 2, 1996, the District Court held a day-long hearing on various trial-related motions. (R. 11-953). Petitioners' counsel participated in this hearing and again did not object to venue. Petitioners also submitted proposed jury instructions and objected to Respondents' proposed jury instructions. (R. 11-944).

In the days before trial, various parties settled. Ultimately, the last group of plaintiffs other than Petitioners resolved its claims on February 5, the morning trial was

scheduled to begin. (Pet. at 5). Later that morning, Petitioners and Respondents appeared before the District Court to select a jury and present opening statements. Upon learning they were the only remaining plaintiffs, Petitioners for the first time moved the District Court to transfer the cases to Mississippi and California.[2] (R. 12-991). Their motion was denied.[3] (Pet. App. at 22a; R.

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[2] Hoping to free ride on the work of the other opt-out plaintiffs, Petitioners did little to prepare for trial. In response to Petitioners' writ of *mandamus*, Petitioners' co-plaintiffs documented this strategy:

> In the fall of 1993, shortly after [P]etitioners opted out . . . counsel for [P]etitioners were invited to participate in the discovery efforts that the State of Florida, the class and [certain opt-outs] had undertaken jointly to share costs, but [P]etitioners refused to pay their fair share of the joint costs. [Certain opt-outs] counsel made it clear at that time that [P]etitioners' decision meant that [P]etitioners were not entitled to share the work product of the other plaintiffs. . . . If [certain opt-outs] ha[d] a "vastly superior position with regard to control of the documents and witnesses" ([Mand.] Br. 20) . . . it was because of their trial preparation. Nothing prevented [P]etitioners from doing their own work.

In re B.C. Rogers, et al., No. 96-2179, Dkt. 2/22/96, at 3-4 (emphasis added).

[3] The District Court chided Petitioners after they claimed shock over a trial in Orlando on the date scheduled nine months earlier:

> So that the notion that some calamity has befallen you at my instance, and is sort of irredeemable, almost, is really not born out by the fact that all of this is the result of circumstances that took place in about a two or two and a half hour span, at the most. . . .

(R. 20-32-34; R. 20-33-34).

20-6-56). Petitioners then unsuccessfully sought a writ of *mandamus* in the Eleventh Circuit.

The trial finally began on March 5 and continued until March 21. After deliberating for less than three hours, the jury returned a verdict for Respondents. (R. 15-1062-1-27; R. 15-1063-1). Petitioners then sought appellate review. In their Eleventh Circuit briefs, Petitioners never claimed the District Court lacked jurisdiction or venue. Instead, they argued convenience:

> Plaintiffs do not contend that venue was not proper under Section 1391. The Middle District of Florida was a district in which these cases could have been brought. . . . [B]ut . . . there are other districts where trial would be more convenient for the parties and witnesses.

(Pet. App. Reply at 13-14).

On January 29, 1998, the Eleventh Circuit unanimously affirmed the District Court's judgment. *State of Florida v. Liquid Air*, 136 F.3d 139 (11th Cir. 1998). Petitioners filed a petition for writ of *certiorari* to this Court, arguing the Eleventh Circuit decision directly conflicted with this Court's decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). This Court granted *certiorari*, vacated the Eleventh Circuit decision and remanded the case to the Eleventh Circuit for further consideration in light of *Lexecon. B.C. Rogers Processors, Inc. v. BOC Group, Inc.*, 524 U.S. 947 (1998).

After reconsideration, the Eleventh Circuit again unanimously affirmed the judgment of the Middle District of Florida. *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321 (11th Cir. 2000). In particular, the appellate

court found "[f]ar from requesting that their cases be remanded to the districts in which they were filed, [Petitioners'] position . . . was that the cases should be tried in Orlando." *Id.* at 1325. Recognizing plaintiffs' right to waive venue, the Eleventh Circuit held: "Having induced the court to rely on a particular erroneous proposition of law or fact, a party in the normal case may not at a later stage of the case use the error to set aside the immediate consequences of the error." *Id.* at 1326 (citations omitted).

The Eleventh Circuit thus distinguished this case from *Lexecon*:

> [A]ppellants' actions throughout pretrial proceedings make this case clearly distinguishable from *Lexecon*. Lexecon requested remand early in the case, insisted that proper venue lay in the Northern District of Illinois (where the case had been filed), and "continuously objected to an uncorrected categorical violation of the [section 1407] mandate," *Lexecon*, 523 U.S. at 43, 118 S. Ct. at 966, when the District Court refused to issue a suggestion of remand. Conversely, appellants in the instant case not only failed to raise the issue of remand until the day of jury selection, but actually stipulated that venue was proper in the Middle District of Florida and consistently urged the District Court to try the case in Orlando.

Id. at 1326-27.

Petitioners filed this petition for writ of *certiorari* on January 8, 2001.

ARGUMENT

THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *HOFFMAN* OR *LEXECON*

Petitioners' concession that Section 1407 is "clearly a venue statute" is fatal to their claim that the "Eleventh Circuit has ruled in a manner that is inconsistent" with this Court's previous decisions. (Pet. at 10, 9).[4]

Since the early 1920s, this Court has held that parties may waive statutory restrictions on venue. *See General Inv. Co. v. Lake Shore & Michigan Southern Ry.*, 260 U.S. 261, 275 (1922) (statute limiting venue in federal question removal cases "merely regulates the place of suit, its purpose being to save defendants from inconvenience"; statute granted "a privilege which they may, and not infrequently do, waive"); *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 655 (1923) (venue provision in removal statute "does not limit the general jurisdiction of the District Courts or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which [it] may assert, or may waive, at [its] election"); *Olberding v. Illinois Cent. R.R. Co.*, 346 U.S. 338, 340 (1953) ("plaintiff, by bringing the suit in a district other than that authorized by the statute, relinquished [its] right to object to the venue."); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979) (venue is a privilege which may be waived).[5]

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[4] In *Lexecon*, this Court held Section 1407 is "a venue statute." 523 U.S. at 42.

[5] Section 1406(b) also explicitly provides that any party may waive venue: "Nothing in this chapter shall impair the

In *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-68 (1939), this Court explained why statutory venue restrictions are not jurisdictional and may be waived:

> The jurisdiction of the federal courts – their power to adjudicate – is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit – the place where judicial authority may be exercised – though defined by legislation relates to the convenience of litigants and as such is subject to their disposition.
>
> * * * *
>
> Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.

Relying on this principle, the Eleventh Circuit held Petitioners waived their objections to venue. *In re Carbon Dioxide Antitrust Litig.*, 229 F.3d at 1325-26, *citing Neirbo*, 308 U.S. at 168 and *Olberding*, 346 U.S. at 340. In particular, it denied Petitioners' eve-of-trial request for transfer "[b]ecause [Petitioners] explicitly requested that the district court try their cases. . . . " *Id.* at 1322. "Far from requesting that their cases be remanded to the districts in which they were filed, [Petitioners'] position . . . was that the cases should be tried in Orlando." *Id.* at 1325. Thus, the Eleventh Circuit concluded Petitioners had waived any objection to venue:

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jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to venue." 28 U.S.C. § 1406(b).

> If [Petitioners] believed that they had a right to have their cases remanded to their original districts, they should not have asked the court to try the case in Orlando. "Having induced the court to rely on a particular erroneous proposition of law or fact, a party in the normal case may not at a later stage of the case use the error to set aside the immediate consequences of the error."

Id. at 1326, *citing Charter Co. v. United States*, 971 F.2d 1576, 1582 (11th Cir. 1992) (internal citation omitted).

Contrary to Petitioners' argument, *Hoffman v. Balski*, 363 U.S. 335 (1960), is inapposite. In *Hoffman*, this Court addressed whether the phrase "where it might have been brought" in 28 U.S.C. § 1404(a) "should be held to relate not only to the time of the bringing of the action, but also to the time of the transfer. . . . " 363 U.S. at 342.[6] Despite the plaintiffs' opposition, the *Hoffman* defendants had attempted to transfer the action to a venue where plaintiffs could not have originally filed. Defendants argued they could waive venue to make the transferee court one where the plaintiff could bring the action. *Id.* This Court, however, rejected defendants' contention that "where it might have been brought" means "where it may now be rebrought, with defendants' consent." *Id.* Relying on Section 1404(b)'s plain meaning, the Court required the transferee court be one in which the plaintiff could have originally brought the action.

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[6] Section 1404(a) provides "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

Thus, the *Hoffman* Court simply held that a party cannot force a transfer to an improper venue over the timely objection of the other party. 335 U.S. at 343-44. Nothing in *Hoffman* precludes *both* plaintiffs and defendants from consenting to venue. In fact, the Court reiterated that "venue, like jurisdiction over the person, may be waived . . . by failing seasonably to assert it, or even simply by making default." *Id.* at 343, *citing Neirbo.*

Unlike the *Hoffman* plaintiffs, Petitioners repeatedly consented to both jurisdiction and venue in the Middle District of Florida. They filed amended complaints there. (R. 737-16; R. 965-13). They signed the Pretrial Order, consenting to venue there. (R. 3-740-25). They submitted jury instructions and filed motions *in limine* for a consolidated trial. (R. 4-771; R. 11-953; R. 11-944). And, on the day of trial, they walked into court ready to pick a jury and make opening arguments.

Petitioners' waiver also distinguishes this case from *Lexecon*. As the Eleventh Circuit explained:

> [A]ppellants' actions throughout pretrial proceedings make this case clearly distinguishable from *Lexecon*. Lexecon requested remand early in the case, insisted that proper venue lay in the Northern District of Illinois (where the case had been filed), and "continuously objected to an uncorrected categorical violation of the [section 1407] mandate," *Lexecon*, 523 U.S. at 43, 118 S. Ct. at 966, when the District Court refused to issue a suggestion of remand. Conversely, appellants in the instant case not only failed to raise the issue of remand until the day of jury selection, but actually stipulated that venue was proper in the Middle District of Florida and

> consistently urged the District Court to try the case in Orlando.

229 F.3d at 1326-27.

Lexecon does not affect waiver under Section 1406(b). To the contrary, it teaches that "a statute is to be considered in all its parts when construing any one of them" and that courts must apply the plain meaning of a statute. 523 U.S. at 36. Under the plain meaning of Section 1406(b), a party may waive venue under any section of that chapter, including of Section 1407. 28 U.S.C. § 1406(b). In fact, this Court noted in *Lexecon* that "a party may waive the § 1407 remand requirement" under Section 1406(b). *Lexecon*, 523 U.S. at 36, n.1.

CONCLUSION

Lexecon and *Hoffman* do not conflict with the Eleventh Circuit's opinion. Petitioners did not "interpose [a] timely and sufficient objection to venue" as required by 28

U.S.C. § 1406(b). Accordingly, Respondents respectfully request this Court to deny Petitioners' Petition for Writ of *Certiorari*.

Respectfully submitted,

MICHAEL J. ABERNATHY
**Counsel of Record*
MARGARET A. MCGREAL
BELL, BOYD & LLOYD LLC
Three First National Plaza
Chicago, Illinois 60602
(312) 372-1121

JOHN E. BURKE
CLAUDIA J. LOVELETTE
CHRISTOPHER J. MURDOCH
MARTIN G. DURKIN
HOLLAND & KNIGHT
55 West Monroe Street, Suite 800
Chicago, Illinois 60603
(312) 263-3600

WILLIAM G. SCHOPF, JR.
PATRICK J. HENEGHAN
ARTHUR J. HOWE
SCHOPF & WEISS
312 W. Randolph, Suite 300
Chicago, Illinois 60606
(312) 701-9300

Attorneys for Respondents

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